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IN THE

Supreme Court of the United States

October Term, 1958

No. 478

FAREED N. KIAMIE and KIAMIE MANUFACTURING CO., INC.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

FAREED N. KIAMIE and KIAMIE FABRICS CO., INC.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on September 3, 1958.

Opinion Below

The opinion of the Court of Appeals set forth in the Appendix has not been reported.

Grounds of Jurisdiction

The judgment of the Court of Appeals was entered September 3, 1958. Timely petition for rehearing (filed September 17, 1958) was denied September 30, 1958. Jurisdiction is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Where during investigation of his income tax liability a taxpayer voluntarily makes an incriminating admission coupled with an exculpatory explanation, and the admission is later made the basis of an indictment and bill of particulars charging him with income tax evasion, upon a trial of the indictment may the admission be received in evidence against the declarant as proof of the facts stated therein without permitting the jury to give the same probative force to the explanation?

2. Where the prosecutor in concluding his summation said to the jury:

> "Now I am sworn to an oath, and you have sworn to your oath. It is not a pleasant thing that we do, but it is a very necessary thing, and I say to you ladies and gentlemen of the jury from the bottom of my heart, that on the facts in this case we have no alternative but to bring back a verdict of guilty on all four counts against Fareed Kiamie and the corporations. Thank you very much.",

were petitioners deprived of their constitutional right to a fair trial?

3. Where indictments and bills of particulars together narrowed the charge by stating that petitioners had evaded corporate income taxes by wilfully failing to report specified corporate sales in their income tax returns, was there a deprivation of petitioners' constitutional rights to be informed of the nature of the accusation and to be tried upon the indictment of a grand jury when the Government with approval of the trial court departed in mid-trial from the

charge of guilt resting on proof of unreported sales, and asserted that petitioners evaded income taxes by applying an improper gross profit percentage to the sales that were in fact reported on the tax returns for the indictment years?

Constitutional Provisions and Statutes Involved

The pertinent constitutional and statutory provisions are set forth in the Appendix, *infra* (A 18-20).

Statement of the Case

Petitioners were tried upon two indictments. The first charged in one count that Kiamie Manufacturing Co., Inc. (Kiamie Mfg.) and Kiamie, as president, filed a false return understating the corporation's net income and tax for its fiscal year ending January 31, 1946 (R 15a-16a).[1] The second charged in three counts that Kiamie Fabrics Co., Inc. (Kiamie Fabrics) and Kiamie, as president, filed false returns understating the corporation's net income and tax for each of its three fiscal years ending April 30, 1945, 1946 and 1947 (R 17a-18a). The first indictment was filed July 12, the second July 14, 1951 (R 15a-19a).

Bills of particulars (one for each indictment) were filed in September 1951 and amended bills in January 1956 (R 24a, 32a, 47a, 53a). Each bill asserted that petitioners had evaded corporate income taxes by wilfully failing to report specified sales, and identified each sale by name and address of customer, date and invoice amount, affirmatively stating that the evasion was not committed in any other way (R 24a-26a, 32a-45a, 47a-51a, 53a-66a). As the Court of Appeals noted, these

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[1] Numerals in parentheses with the letter "A" prefixed refer to pages of the Appendix; with the letter "R" prefixed, to pages of the Appendix to appellants' briefs in the Court of Appeals; and with the letter "G" prefixed, to the Government's trial exhibits. Letters in parentheses refer to defendants' trial exhibits.

> "Bills of particulars narrowed the charge by stating that appellants had evaded corporate income taxes by wilfully failing to report specified corporate sales in their income tax returns for those fiscal years." (A 3)

The Government's case consisted of evidence intended to show that the specified sales were not recorded as such in the regular corporate books, nor reported as such in the corporate income tax returns for the indictment years, and to show the resulting tax deficiencies and criminal intent. In computing alleged tax deficiencies the Government's agent-witness was asked simply to add the unrecorded sales in each indictment year to those reported in the return for that year, to assume that "cost of goods sold" was as stated in the return, and to calculate any deficiency in the income and tax reported (R 735a-38a; G 308-G 371). Having thus limited its proof to the charge, as narrowed by the bills of particulars, the Government rested (R 738a).

Petitioners conceded at the trial, as they had almost from the inception of the Government's investigation, that the corporate sales which the bills of particulars specified as unreported had not been recorded as such in the corporate books, nor reported as such in the returns (R 519a, 529a, 548a-51a, 981a-83a). But petitioners asserted these sales were in effect reflected in the books and the returns by substituting substantially equivalent amounts of fictitious intercorporate sales in the books and returns (R 519a, 529a, 548a-51a, 1515a-18a, 1685a, 1694a, 1832a-34a).

Petitioners' defense was that owing to scarcities and OPA restrictions Kiamie's enterprises, in the struggle for continued existence and economic survival, were compelled to make purchases at over-ceiling prices and overages both payable in cash.[2] To provide the needed cash and yet avoid OPA inquiry, checks received in payment for goods sold were cashed. Neither these sales nor the purchases made

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[2] There was no claim and no evidence that the Kiamie enterprises ever *sold* in the black market or over OPA ceilings.

with the cash proceeds were recorded as such in the regular books of account (R 79a-82a, 452a-54a).

However, a record of these transactions was separately kept. Indeed, in 1948, early in the Government's tax investigation, petitioners voluntarily caused their accountant to prepare and their counsel to deliver to Government agents a schedule listing by date, name and address of customer, invoice number and amount, every unrecorded sale made in 1943, 1944 and 1945 (R 441a-48a, 452a-56a, 468a-69a, 507a; G 229). At the same time petitioners' counsel delivered to the Government agents a schedule of unrecorded purchases made in the same period with the cash proceeds of the unrecorded sales (R 981a-83a). Both schedules were stapled together and turned over as one document (R 435a-44a, 452a-54a).

Details of the unrecorded sales, even including clerical errors, were taken bodily from petitioners' schedule of unrecorded sales into the bills of particulars (R 79a-80a, 1241a-42a; G 229).

At the trial this same schedule became the basic and most important item of Government proof. The prosecutor detached petitioners' schedule of unrecorded sales from their schedule of unrecorded purchases and introduced the former as an admission and proof that the sales there listed had in fact been made and had not been recorded in the corporate books nor reported in the returns (R 981a-83a).

While thus receiving this incriminating schedule of unrecorded sales against petitioners, the trial judge refused to receive their exculpatory schedule of unrecorded purchases as part of the same document (R 454a-63a). And even when, much later and as part of petitioners' defense, their detached schedule of unrecorded purchases was received in evidence, the jury were told they could not consider its contents as any proof that the proceeds of unrecorded sales had in fact been used to make unrecorded purchases, but only as evidence that petitioners had made such a claim to the revenue authorities in 1948 (R 981a-83a).

It thus became vitally important for petitioners to prove they had substituted fictitious intercorporate sales in place of unrecorded sales in the corporate books and on the tax returns. This they did by overwhelming evidence. In fact, as the trial court charged,

> "The evidence that these intercorporate sales were fictitious is overwhelming * * *" (R 1832a)

The jury were instructed that, in determining whether the returns had understated gross profit, they "must" deduct the fictitious intercorporate sales from the reported "gross sales" and then add the unrecorded sales (R 1830a-31a). Thus, the court charged the jury that reported intercorporate sales were a substitute for unrecorded sales.

The trial judge also prepared as "Court's Exhibit 4" a summary of the figures in petitioners' schedule of intercorporate sales (XT), grouping them into indictment years, referred to it in detail in his charge and sent it to the jury room (R 1832a-34a).

The cogent proof that fictitious intercorporate sales were substituted for unrecorded sales is illustrated by the following comparison:

Unrecorded Sales[3]	*Intercorporate Sales*
(G 233)	(Court's Exh. 4)
$643,131.16	$636,322.87

Clearly, then, the jury's verdict cannot be sustained as a finding that petitioners are guilty of the narrowed charge that they evaded corporate income taxes by failing to report corporate sales. The finding of tax evasion was made possible by presenting to the jury the new and different accusation that, although petitioners had in effect reported the unrecorded sales, they applied to the reported gross sales

[3] This figure is based on sales price before deducting commissions paid for check cashing amounting to $7,195.06 (G 318), leaving a balance of $635,936.10 as compared with the $636,322.87 in intercorporate sales.

(including intercorporate sales) an improper gross profit percentage.

Petitioners used the well-recognized and customary gross profit percentage method of computing gross profits, *i.e.*, they applied to the dollar amount of gross sales a percentage of gross profit based on experience and prevailing business conditions (R 1472a-77a).

Gross profit percentage was not mentioned in the bills of particulars. No proof whatever as to gross profit percentage had been introduced by the Government as part of its case. On the contrary, the bills of particulars had explicitly stated "that no part of the excess income was derived from sources other than unreported sales of merchandise", or "by reason of the disallowance of any part of the cost of goods reported * * *."[4] The Government further stated that "no part of the excess income arose as the result of the disallowance of deductions", thus leaving only unreported sales in dispute (R 27a, 44a, 50a, 65a).

Nevertheless, the trial judge refused to permit proof that intercorporate sales were substituted for unrecorded sales unless petitioners would undertake to show that after this substitution they applied an "honest" gross profit percentage to all reported sales (R 1458a-69a). This, under protest, petitioners endeavored to do (R 1461a-69a).

Thus, what had originated with the grand jury as a simple unrecorded sales case became during the trial an improper gross profit percentage case. And, since the new charge arose after the Government had introduced proof of unrecorded sales and then rested, by a subtle shift-

[4] The bills of particulars stated that "the cost to the corporation of all merchandise sold during the said fiscal years, including the value of the corporation's inventory at the beginning and close of said fiscal years, the total amounts paid during said fiscal years for the merchandise; and the aggregate of each of the class of expense for said fiscal years, comprised under the heading 'Cost of Goods Sold' are the figures contained in the income tax returns filed by the defendant" (R 27a, 44a, 50a, 65a).

ing of the burden of proof petitioners were required to show affirmatively that they had used a proper gross profit percentage, while the Government was relieved of its obligation to establish the crime charged, and only that crime, beyond a reasonable doubt.

Finally, this radically altered accusation was presented to the jury by the prosecutor in a grossly improper summation (see Question 2, *supra*, p. 13). He identified himself with the jury and his duty with theirs and gave fervid expression to a personal conviction of petitioners' guilt, spoken, as he said, "from the bottom of my heart". The Court of Appeals was "disturbed" even by a de-emphasized version of the prosecutor's remarks (A 17), although the most objectionable words used are not repeated in the opinion (A 17).

REASONS FOR GRANTING THE WRIT

Question No. 1

We have briefly described the District Court's treatment of petitioners' schedule of unrecorded purchases (MQ), as contrasted with its treatment of petitioners' schedule of unrecorded sales (G 229), the backbone of the Government's case. That treatment raises the question:

> Where an incriminating admission is coupled with an exculpatory explanation, may the admission be received in evidence against the declarant as proof of the facts stated therein, without permitting the jury to give the same probative force to the explanation?

Admittedly, G 229 was stapled to MQ when petitioners voluntarily delivered both schedules to Government agents as one document. However, as the Court of Appeals noted, G 229 "was received during the Government's case as proof of the facts stated therein", but MQ "was not admitted as proof of the facts stated therein" (A 14-15).

Nonetheless, the Court of Appeals concludes "that this ruling was not erroneous" (A 15-16), citing cases which, peculiarly enough, petitioners had cited as demonstrating that the ruling was erroneous (App. Br. p. 59). The lower court cites those cases for the proposition that

> "229 having been properly treated as an admission, MQ could be treated as an exculpatory portion of an admission or as an explanation of an admission" (A 15-16).

But the District Court did not give Exhibit MQ the evidentiary effect required by this basic rule of evidence.

Exhibit MQ could have been "treated as an exculpatory portion of an admission" only if it were admitted as proof of the facts stated therein, to be given such weight as the jury deemed warranted. For a statement which may not be taken as proof of the facts stated cannot possibly be exculpatory of the incriminating admission which it attempts to explain. An explanation which cannot be credited is no explanation at all. It is precisely because the District Court prevented the jury from giving MQ any weight as exculpation or explanation that reversible error was committed.

This is clear from the trial court's instructions to the jury when he finally received Exhibit MQ in evidence (R 981a-83a):

> "So this paper, under the law, may now be submitted to you, although under ordinary circumstances it couldn't, *for the purpose of showing that at that time*, when the defendants were in negotiation with the Internal Revenue officers, *they made this claim* that the money which was indicated to have been received by Exhibit 229 had been disbursed in a certain way. So that while the paper is in evidence *it is in evidence only for the purpose of showing that that claim was made at that time, and if the defendants wish to show you what actually was done with that money that evidence will have to come from some other source. This cannot be treated as proof of what actually was done with the money. It is only*

before you to show that the claim was made at that time." (Emphasis ours.)

In other words, the District Court told the jury:

> The defendants have told the Government that there were millions of dollars in unrecorded sales (G 229). Not only may you believe that the defendants made that statement, but you may also believe that the statement is true. The defendants also have told the Government there were millions of dollars of cash purchases made with the proceeds of the unrecorded sales (MQ). You may believe that statement was made, but you may not consider the document (MQ) as any proof that the statement is true. All you may believe with respect to this second statement is that it was made at the same time that the first statement was made.

The ruling below is so basically unfair and one-sided that one is not surprised to find it in conflict with a principle of evidence of ancient judicial origin. This Court held erroneous the virtually identical treatment given an admission by the lower courts in *Insurance Company* v. *Newton*, 89 U. S. 32, 35 (1874), where Justice Field stated:

> "The court below allowed the statement of the company and its agent to the witness as to the sufficiency of the proofs of death of the insured to be received as conclusive of that fact, but by its charge to the jury in effect separated the admission of that fact from its accompanying language, that the proofs disclosed a case of suicide, and held that this latter statement was of an independent fact to be established by the company. In this particular we think the court erred. Every admission is to be taken as an entirety of the fact which makes for the one side, with the qualifications which limit, modify, or destroy its effect on the other side. This is a settled principle which has passed by its universality into an axiom of the law. Here the admission related to the two particulars which the proofs established, the death of the insured and the manner of his death, both of which facts appear by the same documents. They showed the death of the insured only as they showed that he had com-

> mitted suicide, and all that the officers of the company evidently intended by their declaration was that they were satisfied with the proofs of the one fact because they established the other. The whole admission should, therefore, have been taken together. If it was sufficient to establish the death of the insured, it was also sufficient to show that the death was occasioned in such a manner as to relieve the company from responsibility."

The holding below is also in conflict with other Circuit and State court decisions. See, *Perrin* v. *United States*, 169 Fed. 17, 26-27 (9 Cir. 1909); *Gangi* v. *Fradus*, 227 N. Y. 452, 456, 457 (1920); *People ex rel. Perkins* v. *Moss*, 187 N. Y. 410 (1907); 2 Wharton's Criminal Evidence (12 Ed. 1955) § 361. It is not supported even by *Waters* v. *Kings County Trust Co.*, 144 F. 2d 680 (2 Cir. 1944), *cert. denied*, 323 U. S. 769, relied on by the court below. There, plaintiff introduced part of defendant bank's history sheet as proof of the facts recorded. Other entries in the same sheet were properly received at defendant's instance as part of an entire admission, under the settled rule stated by the court as follows:

> "Where a part of a writing has been received in evidence as containing admissions, the party against whom it is offered may introduce the rest of the writing to explain or qualify the alleged admissions." (*Id.* p. 682)

These authorities hold that all parts of an admission are equally admissible and that the probative weight to be given the admission, in whole or in part, is for the jury to determine and not the court.

The treatment of MQ by the lower courts also violates Rule 26 of the Federal Rules of Criminal Procedure (A 20). If, as has been suggested by one eminent authority,[5] "uniformity of the law of evidence is neces-

[5] Holtzoff, on Criminal Cases in the Federal Courts, printed as a preface to the Federal Rules of Criminal Procedure: 1955 Revised Edition.

sary in criminal cases" and in the course of time Rule 26 "may permit the gradual growth and development of a Federal criminal law of evidence", it seems of first importance that the present error should be corrected, not only to preserve uniformity in the law of criminal evidence in the Federal courts, but to stifle at once an error which, if permitted to grow and spread, may insidiously permeate that law.

The error is substantial. As the lower court recognized, it was essential for the defense to prove "that the unrecorded sales were matched by a similar amount of unrecorded black market purchases" (A 4). As that court noted, Exhibit MQ was "a schedule of alleged cash payments to some twenty-nine vendors * * * totaling $1,405,157.05", and "was delivered to the investigating agents as Kiamie's explanation for the unrecorded sales" at the same time that Exhibit 229, "a schedule of unrecorded sales * * * totaling $1,323,334.42 was made available to them" (A 4). While the trial court permitted the Government to establish the petitioners' guilt through 229, they were not permitted to establish their innocence through MQ.

This Court has repeatedly considered the misuse of admissions as warrant for certiorari, *e.g.*, *Smith* v. *United States*, 348 U. S. 147 (1954); *United States* v. *Calderon*, 348 U. S. 160 (1954); *Opper* v. *United States*, 348 U. S. 84 (1954); *Lutwak* v. *United States*, 344 U. S. 604 (1953); *Krulewitch* v. *United States*, 336 U. S. 440 (1949); *Fiswick* v. *United States*, 329 U. S. 211 (1946).

As a question of evidence the issue here raised is one of serious import. But it goes beyond the field of evidence and strikes at the foundation of our self-assessment system of taxation, namely, taxpayer cooperation with Government representatives. As was recently stated in a Progress Report of the Subcommittee on Internal Revenue Taxation to the Committee on Ways and Means of the House of Representatives, 85th Cong., 1st Sess. 24 (April 22, 1957):

> "The task of the [Internal Revenue] Service is without a doubt the most sensitive of any task in the Federal administrative structure. Operating under a huge body of technical, complex tax laws, it has to do business directly with an enormous number of taxpayers and in a manner which will encourage their cooperation with a system geared largely to full reporting and self-assessment. The single most important factor of successful Federal tax enforcement in this country is taxpayer attitude."

The taxpayer who freely reveals the facts affecting his tax liability should not be confronted in a later tax prosecution with the full force of those disclosures which tend to incriminate him and yet be denied equal probative advantage from those concomitant disclosures which proclaim his innocence. The rulings below are an invitation to taxpayers to invoke the Fifth Amendment rather than give assistance to the Government in determining whether a deficiency exists.

Question No. 2

Although the Court of Appeals expressed concern regarding the prosecutor's remarks in his summation, it held (A 17):

> "We are disturbed that the prosecutor stated at the close of his summation his personal belief 'that on the facts in this case we have no alternative but to bring back a verdict of guilty on all four counts against Fareed Kiamie and the corporations.' But defense counsel had already stressed to the jury his belief in appellants' innocence, and thus, as the trial court put it, placed the prosecution in the position of having to say, 'Well, I, too, believe in the case that I have been presenting.' See, *Lawn* v. *United States*, 78 S. Ct. 311, 303 n. 15 (1958); *Henderson* v. *United States*, 218 F. 2d 14, 19 (6 Cir. 1955), *cert. denied*, 349 U. S. 920 (1955)."

This comparative paraphrase minimizes the force of the prosecutor's summation and magnifies that of defense counsel.

At the end of a vigorous address castigating petitioner Kiamie,[6] the prosecutor said:

> "Now I am sworn to an oath, and you have sworn to your oath. It is not a pleasant thing that we do, but it is a very necessary thing, and I say to you ladies and gentlemen of the jury from the bottom of my heart, that on the facts in this case we have no alternative but to bring back a verdict of guilty on all four counts against Fareed Kiamie and the corporations.
>
> Thank you very much." (R 1778a.)

Defense counsel, in his summation, had stated:

> "I don't think I need say much more. You know the charge; you have heard the evidence. I think he is entitled to an acquittal, and I don't think you can brand him a criminal on the kind of testimony that has been produced before you.
>
> Thank you very much." (Gov't Appendix 285a)

The statement by defense counsel of his view that petitioners should be acquitted on the evidence was nothing more than expression of professional opinion, proper and indeed unavoidable in any summation. It certainly did not invite or justify the prosecutor's inflammatory peroration. In response, the United States Attorney went far beyond simply saying, in effect, "Well, I, too, believe in the case that I have been presenting."[7]

First, he stated:

> "Now I am sworn to an oath, and you have sworn to your oath."

This was strong indication that, as it was the prosecutor's sworn duty to prosecute, so it was the jury's sworn duty

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[6] The portion of the Government's summation here dealt with was only the culmination of a series of earlier improper statements to which futile objection was made by petitioners. (See *e.g.*, R 1736a-40a, 1742a, 1753a, 1757a, 1759a, 1763a, 1768a-69a, 1771a-72a, 1775a-76a, 1778a, 1780a-94a.)

[7] He had already done this at the beginning of his summation (R 1736a).

to convict. The impression was deepened by the next sentence:

> "It is not a pleasant thing that *we* do, but it is a very necessary thing, * * *." (Emphasis ours.)

It would not be "a pleasant thing" to convict, and this identification of the prosecutor with the jury by his use of the embracing "we" was improper. *Steele* v. *United States*, 222 F. 2d 628, 631 (5 Cir. 1955). The identification of their respective obligations was as bad if not worse. As this Court said in *Berger* v. *United States*, 295 U. S. 78, 88 (1935):

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

This wise admonition was disregarded by the prosecutor when he said in conclusion:

> "* * * I say to you ladies and gentlemen of the jury *from the bottom of my heart*, that on the facts in this case *we* have no alternative but to *bring back a verdict of guilty* * * *." (Emphasis ours.)

The lower courts here are the only ones, so far as we know, which have countenanced such an appeal to a jury. To the contrary, use of the very same phrase—"the bottom of my heart"—in a prosecutor's summation was condemned in *State* v. *Thayer*, 124 Ohio St. 1, 176 N. E. 656, 657 (1931). Similar comments have been disapproved by bench and bar. *People* v. *Lovello*, 1 N. Y. 2d 436, 439 (1956); *People* v. *Swanson*, 278 App. Div. 846 (2d Dept. 1951); *State* v. *Gunderson*, 26 N. D. 294, 144 N. W. 659, 660 (1913); See, Canon 15, Canons of Professional Ethics (N. Y. State Bar Assn.).

This may be the occasion to revivify the high standard of conduct for prosecutors set by this Court in *Berger* v. *United States*, *supra* (p. 88):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The standard thus fixed, as we believe, requires that the prosecutor's inflammatory summation at bar be disapproved and that the resulting conviction be reviewed and reversed by this Court on that ground alone.

Question No. 3

The indictments omitted and the bills of particulars expressly disclaimed the charge of improper gross profit percentage which was ultimately submitted to the jury.

The Federal Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding." Rule 2. Accordingly, they require that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged". Rule 7(c). To clarify an indictment the court "may direct the filing of a bill of particulars." Rule 7(f).

The Third Circuit has held that where a bill alleged collection of dues from named persons on specified dates, it was error to permit a later bill alleging collection of dues from other persons on other dates, saying that a—

> "bill of particulars strictly limits the prosecution to proof within the area of the bill." *United States* v. *Neff*, 212 F. 2d 297, 309 (1954).

This Court, in *Glasser* v. *United States*, 315 U. S. 60, 66 (1942), in upholding an indictment as sufficient, affirmed the Court of Appeals for the Seventh Circuit, which had stated:

> "The object of a bill of particulars is to give the defendant notice of the specific charges against him and to inform him of the particular transactions in question, so that he may be prepared to make his defense. Its effect, therefore, is to limit the evidence to the transactions set out in the bill of particulars."

The Eighth Circuit in *Braatelien* v. *United States*, 147 F. 2d 888 (1945), held:

> "Where the facts are detailed in a bill of particulars, he who furnished it will be confined by the court to the proof of the facts so specified."

Bryan v. *United States*, 175 F. 2d 223 (5 Cir. 1949), *aff'd*, 338 U. S. 552 (1950), is apposite. The indictment charged income tax evasion by filing false returns. Bills of particulars limited "the alleged evasions to understatements of the gross receipts derived from the business operated by appellant." There, as here, the bills expressly excluded the claim that the deductions taken were improper. Reversing the conviction, the Fifth Circuit Court of Appeals said (p. 224):

> "Measured, as the proof must be, by these bills of particulars, the conviction must stand or fall upon the proof, or lack of proof, of false statements knowingly made for the purpose of evading income taxes in the returns of gross business receipts for the years in question."

By this test the evidence was found insufficient. This Court affirmed.

Here, the court below stated:

> "Bills of particulars narrowed the charge by stating that appellants had evaded corporate income taxes by wilfully failing to report specified corporate sales in their income tax returns for those fiscal years."

Nevertheless, it permitted the charge to be changed from one of tax evasion by failure to report specified corporate sales to a wholly different charge of tax evasion by applying to *reported* sales an improper gross profit percentage. This the court did notwithstanding the express statement in the bills of particulars that "no part of the excess income was derived from sources other than *unreported* sales of merchandise." (Emphasis ours.)

The bills contain the further clarification that no part of the alleged excess net income arose "by reason of the disallowance of any part of the cost of goods reported." This should have precluded the later claim of the use of an improper gross profit percentage, since the percentage determines the gross profit and by deducting gross profit from sales computes the cost of goods sold (R 1480a-81a). Therefore application of an incorrect gross profit percentage necessarily results in an incorrect calculation of costs. To challenge percentage is to challenge costs. Yet the bills assured the defendants that no part of the "cost of goods reported" was questioned.

The courts below, in sanctioning the Government's departure at the trial from its bills of particulars, are not only in conflict with Courts of Appeal in other Circuits, but their holdings have deprived petitioners of their constitutional right "to be informed of the nature and cause of the accusation" against them (Sixth Amendment), and to be tried upon "a presentment or indictment of a Grand Jury." (Fifth Amendment.) Here the crime tried was not the crime charged. There was an improper change of the charge at the trial.

The indictments themselves confined the charge to one of unrecorded sales. The figures set forth in the indict-

ments were computed by adding the unrecorded sales to the net income figures appearing in the corporate income tax returns.[8]

The Court of Appeals, Third Circuit, stated in *United States* v. *Krepper*, 159 F. 2d 958, 970 (1946), *cert. denied*, 330 U. S. 824 (1947):

> "When an indictment is filed with the court, no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a re-submission of the case to the grand jury. * * * This was the doctrine of the English courts under the common law. It is the uniform ruling of the United States Courts except where statutes prescribe a different rule, and it is the imperative requirement of the provision of the Constitution above recited [Fifth Amendment], which would be of little avail if an indictment once found can be changed by the prosecuting officer, with consent of the court, to conform to their views of the necessity of the case."[9]

Not only did the case go to the jury upon a radically altered charge of guilt, but this altered charge was one which, by a subtle shifting of the burden of proof, petitioners were required to *disprove*. Had the indictments and bills of particulars in the first place charged petitioners with tax evasion by application of a dishonest gross profit percentage, the burden of proving the charge beyond a

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[8] For example, the first count in indictment C 136-60 alleged that "the net income" set forth in the return was "$3,285.92" and that it should have been "$384,396.85". The difference is exactly the amount of unrecorded sales attributed by the Government to the defendant companies, $381,110.93 (R 18a, 53a; G 229).

[9] To the same effect are *Epstein* v. *United States*, 174 F. 2d 754, 760, 763 (6 Cir. 1949)—indictment charged fraudulently excessive prices while proof showed violation of fiduciary duty; *United States* v. *Byers*, 73 F. 2d 419, 421-422 (2 Cir. 1934)—indictment charged fraudulent buying but proof showed fraudulent selling; *Hallman* v. *United States*, 208 F. 2d 825, 826-827 (D. C. Cir. 1953)—indictment charged sale of narcotics to James Fair and proof showed sale to Roland Jones.

reasonable doubt would have been with the Government and would never have shifted to the defense. *United States* v. *Indian Trailer Corporation*, 226 F. 2d 595, 598 (7 Cir. 1955); and see *Holland* v. *United States*, 348 U. S. 121, 138 (1954). The Government would have been required to prove as part of its case that the gross profit percentages used by petitioners were improper.[10]

No proof of this character was attempted by the Government as part of its case.[11] Instead, under protest petitioners were required to justify their gross profit percentages as part of their case. From that point on the prosecution treated the subject of gross profit percentages as a matter of "defense" (*e.g.*, R 1743a, 1749a-52a). Thus, the case finally went to the jury on a distorted charge of guilt which the defendants were required to disprove.

CONCLUSION

In summary, this case introduces far-reaching innovations into the law of criminal evidence; the court below has condoned conduct of a United States Attorney violative of applicable standards of this Court; and the court has

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[10] The Government might have employed an evidentiary technique standard in such cases—proving the normal gross profit realized by others engaged in the same type of business at the same time and place. See *Harvey* v. *Early*, 189 F. 2d 169, 170 (4 Cir. 1951); *Bechelli* v. *Hofferbert*, 111 F. Supp. 631, 635 (D. Md. 1953); *Miller* v. *Commissioner*, 10 T.C.M. 33 (1951); *Boussen* v. *Commissioner*, 10 T.C.M. 158 (1951); *Shinkonis* v. *Commissioner*, 10 T.C.M. 503 (1951); *Holder* v. *Commissioner*, 11 T.C.M. 91 (1952); *Stone* v. *Commissioner*, 2 T.C. 893 (1954); *Tunningley* v. *Commissioner*, 22 T.C. 1108 (1954); Balter, Fraud Under Federal Tax Law (2d Ed. 1953) 320.

[11] Government's witness Smith, who computed the alleged tax deficiencies under the original charge (R 735a-38a), was not even recalled to recompute the claimed deficiencies under the charge as altered.

sanctioned such a departure from the accepted and usual course of judicial proceedings, in conflict with decisions of other Courts of Appeal, as to call for an exercise of this Court's power of supervision.

Dated: New York, New York,
October 28, 1958.

Respectfully submitted,

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Certificate of Service

William R. Meagher

I, ~~Theodore Kiendl~~, counsel for petitioners in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 28th day of October, 1958, I served copies of the foregoing petition for writ of certiorari on the United States of America, Respondent, by causing copies thereof to be mailed in duly addressed envelopes, with postage prepaid, to The Solicitor General, Department of Justice, Washington, 25, D. C., and the United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Dated: October 28, 1958.

William R. Meagher

~~Theodore Kiendl~~,

Counsel for Petitioners.